UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM N. CUMMING, Petitioner	)	
v.	)	Criminal No. 00-28-B-S
	)	Civil No. 02-186-B-S
UNITED STATES OF AMERICA, Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

William N. Cumming is serving a thirty-seven month sentence for conspiring to manufacture in excess of 100 marijuana plants, a charge to which he entered a conditional guilty plea. The plea was conditioned on his right to appeal an order by this court denying his motion to suppress evidence gained when law enforcement officers searched his premises pursuant to a warrant, the validity of which was disputed. Cumming's appeal was unsuccessful, although the First Circuit Court of Appeals upheld the prosecution-favorable outcome on different grounds. Cumming now pursues 28 U.S.C. § 2255 relief from his conviction, pressing three ineffective assistance of counsel grounds and preserving four other "issues." (Docket Nos. 56 & 59.) I now recommend that the Court **DENY** Cumming the relief he seeks.

The Search Warrant Dispute

Cumming and his co-defendant, Andrew Diehl, were indicted on May 17, 2000. Both defendants sought suppression of evidence gained after a search by warrant.[1] In its decision on Cumming and Diehl's direct appeal, the First Circuit Court of Appeals summarized the relevant background as follows:

> The evidence appellants seek to suppress--drugs and various drug-manufacturing items--was seized pursuant to a facially valid warrant permitting a search of their 17-acre parcel of land in Phillips, Maine. The primary focus of these appeals, however, is an earlier, warrantless entry onto the property by Agent Milligan and two associates. Throughout this case, the government has taken the position that Milligan's report that he smelled marijuana during that visit was necessary to establish the probable cause justifying issuance of the warrant. Whether or not we would agree with that conclusion, we consider ourselves bound by it. Thus, if Milligan obtained the olfactory evidence through conduct that violated the Fourth Amendment, the warrant would have been defective and the resulting search would have been unlawful. Appellants contend that Milligan violated the law because he was within the curtilage of their home without permission when he obtained the critical evidence.
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> To set the stage for our legal discussion, we describe below appellants' property, the evidence presented in the warrant application, including details of Milligan's pre-warrant visit, and the testimony given at the hearing on appellants' suppression motion.
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> The Property. Appellants' property was reached only by proceeding some 700 feet along a discontinued town road (the Old Bray Hill Road), then ascending a 500-foot dirt driveway, which was bordered closely by forest and contained a dogleg turn shutting off a view of the full length. "No Trespassing" signs were posted at the beginning and near the end of the driveway. The driveway terminated in a clearing of less than half an acre. In the clearing was a crude camp, occupied by appellant Diehl, his wife, and appellant Cumming, an outhouse, a pen for animals, and a line for drying laundry. At the time of the search in February 2000, the clearing was covered by snow except for a plowed parking area for vehicles. Beyond the camp, a path led to a 20-by-72-foot wood storage building, which housed appellants' marijuana production operation.
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> The Warrant Application. Before Agent Milligan made the warrantless entry onto appellants' property, he had assembled the

[1] As relevant to the disposition of this motion, the evolution of the defendants's position is discussed below.

following information, which he later included in his affidavit: Franklin County Deputy Sheriff Cayer had reported that a public safety official whom the sheriff considered reliable had relayed statements from three Massachusetts hunters that, during the preceding November, they were near a newly constructed, windowless barn or garage-type building on the property when three men emerged with rifles and ordered them off the land; in May 1999, a Florida company, Ian Fabrications, purchased the property in question and obtained a town permit to construct a 20-by-72-foot storage building, with no septic or water facilities; appellant Cumming identified himself as one of four men running the company, but refused to answer the town clerk's question about the nature of the business. The application further reported that when Deputy Cayer and another deputy recently drove to the property to investigate, Cumming ran to their vehicle before they had a chance to exit, and another man was seen nervously peeking out from a door; that Cayer had learned that appellant Diehl was the only named officer of the company; that the company had been dissolved by Florida in September 1999 for failure of documentation and had no papers on file with the Maine Secretary of State; and that the local postmaster indicated that the company had received no business-related mail.

The warrant application also recited that Milligan, suspecting that the new storage building in such a remote spot might be the site of an elaborate indoor marijuana cultivation operation, procured an administrative subpoena and received power consumption records from Central Maine Power Company showing that the camp, during the past eight months, had consumed 16,627 kilowatt hours of power, while the storage building in the last three months had consumed 12,731 kilowatt hours (an average monthly use more than twice that of the camp); and that, on February 23, 2000, at 2:45 a.m., using a thermal detection device while flying in a helicopter at about 1,000 feet, Milligan determined that heat was escaping from portions of the camp and "on all sides of the storage building," and that surface temperatures--especially for the storage building--were "significantly higher" than normally found in similar structures.

The application concluded with averments that cultivating marijuana under high intensity discharge lamps creates a large amount of heat, necessitating venting of excess heat and stale air, and with several statements, which we will discuss later, addressed to the need for a no-knock/night-time warrant.

Milligan also described the conduct giving rise to the curtilage issue. Paragraph 14 reports that at about 3 a.m. on February 24, 2000, he and two other officers went on foot to "the non-curtilage area of the property" to conduct a better thermal detection inspection of the camp and storage building. Milligan describes what happened as follows:

While standing on the dirt road away from the curtilage of the camp, I pointed a hand-held thermal detection device at the camp and began my

> survey. While doing so, I could hear a loud "hum" which is consistent with noise made from ballasts providing power to high intensity lights commonly used in indoor marijuana cultivation operations. I could also hear at least two males laughing and talking inside the camp. Moments later, I could smell a strong odor of what I recognized to be growing marijuana coming from the property in question. Since I could smell marijuana and realized that suspects were awake inside the camp, I decided to terminate the thermal inspection and withdraw from the property to ensure officer safety.
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> The search warrant was issued at 7:17 p.m. the next day, authorizing an unannounced, night-time search. The search yielded 360 growing marijuana plants, 483 "cuttings" in a rooting compound, scales, grow lights, seeds, and harvested marijuana.

United States v. Diehl, 276 F.3d 32, 34 -36 (1st Cir. 2002).

Discussion

Cumming is entitled to habeas relief from his federal conviction only "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶1.

In order to establish that his attorney's representation violated his constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment, Cumming must make the two-pronged showing established in Strickland v. Washington, 466 U.S. 668 (1984). Cumming must demonstrate that his counsel's performance was so deficient it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. He must also show that he suffered meaningful, measurable prejudice as a consequence. Id. at 687.

The Pressed Claims

The overriding theme of Cumming's petition is that his attorney failed to adequately undermine the existence of good faith on the part of the officers involved in obtaining the search warrant. Accordingly, it is necessary to track the defense's advocacy as it relates to the determinative question of the good faith. The delineated grounds in Cumming's § 2255 motion--pertaining to the Hargreaves's affidavit, the power records, and Milligan's testimony at the hearing – are in essence movements in this larger theme.

Cumming argues that his attorney should have more forcefully challenged the good faith underlying the Milligan affidavit, starting with his motion seeking suppression of evidence and a Franks v. Delaware, 438 U.S. 154 (1978) hearing. (Mot. Suppress & Request Hr'g.) In his view, his attorney should have continued to press for a Franks hearing despite the outcome of my recommendation on the curtilage question.

In his suppression motion Cumming's attorney challenged, among other things, the factual accuracy of ten paragraphs in the warrant affidavit, arguing that they were either deliberately false or made with a reckless disregard for the truth. (Cumming Mot. Suppress & Hr'g at 4.) Counsel argued that the representation concerning the postmaster conversation and the power records were two of several factual inaccuracies that together undermined the probable cause for the warrant's issuance. (Id. at 6-7.)

The percolation of Cumming's motion to suppress was impacted by co-defendant Diehl's suppression efforts. Diehl filed two early motions to suppress (Dockets No. 11 & 12), one of which was based on his argument that Milligan had to have been inside the curtilage of the property when he smelled the odor of marijuana and/or heard lights

humming. The United States responded to both motions by arguing that there was ample probable cause for the warrant and, if not, the agents executing the warrant reasonably relied in good faith on the issuing judge's determination that probable cause existed. (Docket Nos. 16 & 17.) I held a scheduling conference, after which a report issued that set a hearing, the contents of "which would be initially limited to the question of pre-warrant incursions onto the curtilage and that any further Franks hearing ... would be contingent upon the outcome of the initial evidentiary hearing and any further legal authority presented to me." (Docket No. 19.) This hearing was held on September 8, 2000.

The First Circuit described the hearing before this court as follows:

> The Hearing. The magistrate judge granted a hearing on appellants' motions to suppress. In testifying about the 3 a.m. approach on February 24, Milligan said that he and his two associates first attempted to walk through the woods directly to the storage building but the snow was too deep. They then followed what Milligan called the dirt road or driveway off Old Bray Hill Road to a utility pole at the edge of the clearing. He said that the driveway was plowed at least to the camp, but he did not go all the way. He was in the lead of his group and was manipulating the thermal imaging device. On direct examination, he said that he did not go past the pole. On cross examination he said that he remembered taking only two steps beyond the pole, then later, after reviewing a video, said he thought he was fifty, then later, thirty feet behind the pole when he was operating the imager.
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> The parties had visited the property in the summer following the search in an effort to pinpoint Milligan's location when he smelled marijuana. A comparison video was made and showed a telephone pole at the entrance to the driveway, a second one at the curve in the driveway, and a third telephone pole at the beginning of the clearing, eighty-nine feet from the camp. Cumming testified that Milligan must have been between the last pole and the camp, approximately eighty-two feet from the residence. The magistrate judge, relying on the video and Milligan's inconsistent versions, so found.
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> Other evidence addressed the steps taken by appellants to protect their privacy. They had refused to allow a straight swath to be cut for a power line from the Old Bray Hill Road to their buildings, and instead cleared an indirect path so that the line could follow the bend in the

> driveway. They had their mail delivered to a post office box in town. They instructed UPS to leave parcels at a store. They reached an understanding with their nearest neighbor to respect their passion for privacy. In the three months preceding the events in question, they had received only three visitors: the prior owner, the tax assessor, and local police who were trying to unearth some information about appellants.
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> Finally, there was testimony about the uses to which the clearing around the camp had been put. Because the living quarters were minimal and poorly sound-proofed, appellants and Mrs. Diehl testified that they would go outdoors to talk, use the portable telephone, meditate, read, write letters, play with pet goats, play frisbee and horseshoes, usher in the new year, and hang laundry on the line. Cumming occasionally would urinate there if the camp bathroom were occupied, and he sunbathed in the nude. The Diehls would repair to a bench for intimate times, even well into the fall. Milligan had no knowledge of such activities. When he made his approach, snow was on the ground and one vehicle was buried, another parked on the plowed area.

Diehl, 276 F.3d at 36-37.

Cumming and Diehl filed a post-hearing joint memorandum in support of their motions to suppress. (Docket No. 25.) Indicating that the "primary focus" of the hearing was whether the officers violated the curtilage in their pre-search reconnaissance the morning of February 24, 2000, the defendants argued that the government's video tapes and Cumming's testimony were unrebutted by the government and proved that Milligan was within eighty-seven feet of the camp and that Milligan was not being truthful when he testified to the contrary. (J. Mem. Mot. Suppress at 1-3.) Counsel jointly argued that the evidence showed that Milligan purposefully moved closer to the camp once he started filming. (Id. at 3.)

The defendants also anticipated the government's argument that the good faith exception would apply. With respect to the affidavit's Paragraph 14 description of Milligan as being in the non-curtilage area of the property, counsel stated that it was "difficult to imagine how this statement could have been more misleading." (Id. at 12.)

They argued that, under either a narrow or broad view of the parameters of the good faith exception, there was no entitlement the good faith exclusion exception "for the simple reason that the officers did not act in good faith." (Id. at 13.) There was no further motion on the Franks hearing request by either defendant.

In my recommended decision I addressed the curtilage question vis-à-vis my only concern: "whether, when he detected the odor of marijuana, the agent was standing within an area that the Defendants reasonably could have expected would be treated the same as the home itself." (Recommended Decision Mot. Suppress at 8.) I concluded:

> In the final analysis, the fact that the Defendants' operation was uncovered by Agent Milligan is primarily a consequence of the fact that it produced an odor that could be carried on the wind beyond the curtilage of the home. It is not my intention to imply that the Defendants did not deeply desire that no one should turn into their driveway uninvited, let alone enter the forest clearing unannounced. Nor do I wish to suggest that the Defendants' desire was unreasonable, given the nature of their activities. The fact that Agent Milligan's entry onto the Defendants' land did not extend beyond those boundaries that, for example, an errant visitor would clearly recognize as delineating intimate space, reassures me that the smell of marijuana was not detected by means of a constitutional violation.

(Id. at 10-11.) Because I did not find a constitutional violation had occurred I made no detailed findings regarding the "good faith" of the officers vis-à-vis their entry onto the curtilage. The District Court adopted this recommendation. (Docket No. 34.)

Per their conditional pleas, the defendants appealed this determination to the First Circuit Court of Appeals. Along with their argument regarding the curtilage, their joint brief anticipated that the United States would argue that the United States v. Leon, 468 U.S. 897 (1984) good faith exception to exclusion should apply to the facts. (J. Appellants' Br. at 44.) Relying on the discussion of the exception in United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996), Cumming and Diehl argued that Milligan's

affidavit stated that he made his observations "'while standing on the dirt road away from the curtilage of the camp'" while knowing that he had "purposefully turned off the road and walked 500 feet up a driveway and 50 feet into the appellants' yard." (J. Appellants' Br. at 44.) "It is difficult to imagine," Cumming and Diehl argued to the First Circuit, "how this statement could have been more misleading. In this context, the difference between a road and a driveway is palpable." (Id. at 44-45.) They also pointed out that I had "charitably" characterized Milligan's claim that he was on the road as "'not entirely accurate.'" (Id. at 45.) In the defendants' view, Milligan impermissibly assured the judge that he was not in the curtilage and at the same time failed to accurately provide sufficient information to the judge entertaining the warrant application to independently analyze the concern. (Id. at 45-46.)

After arguing that the curtilage determination was correct, in its brief the United States maintained, in the alternative, that the Leon good faith exception to exclusion should apply to the facts and the ruling below should be upheld. (Sec. 2255 Mot. Ex. 4 at 40-42.) It pointed to the fact that Milligan fully disclosed in the warrant application "the ruse" the police used to make their first entry on the property (id. at 42.) when Deputy Cayer drove to the camp under the guise of looking for someone wanted on a parole violation (id. Ex. 1 ¶ 6). Furthermore, it argued that the facts, in their totality, "clearly amounted to probable cause," in that the involvement of Ian Fabrications, Inc. in the purchase of the land had the appearance of a "front," there was unusually high usage of power per the subpoenaed documents, and instances of "furtive behavior by the occupants of the property, including their order to hunters to leave at gunpoint. (Id. Ex. 4 at 40-42.) With respect to my criticism of Milligan for not being "entirely accurate"

concerning his position with respect to the curtilage at the time that he smelled the marijuana odor, the United States argued that this fell far short of constituting a finding that Milligan knowingly or recklessly included a material falsity in the warrant application. (Id.) It viewed this court's determination that Milligan was outside the curtilage as representing an agreement with Milligan's representation that he was outside of the curtilage, which indeed it was.

In their reply brief the attorneys for Diehl and Cumming responded:

> The Appellants strongly believe that the Government cannot meet its burden of showing that some "good faith" exception should allow the search in this case if the warrant is found to be defective. The Magistrate below found the Government's affiant to have misstated the nature of his trespass both in his affidavit (in which he said he was standing on the "road way" leading to the Appellant's home, and that he was outside the curtilage). She further found that he also misstated the extent of his trespass onto the property when he testified under oath before her. It goes against every notion of "good faith" to allow an officer to mischaracterize evidence solely for the purpose of getting a search warrant, and then when his mischaracterizations are revealed, for him to say he was acting in "good faith" when he executed that search.

(J. Appellants' Reply Br. at 8.)

The First Circuit Court of Appeals held that this court erred in concluding that a law enforcement officer was not in the curtilage of Cumming's home when he detected the marijuana odor. Diehl, 276 F.3d at 41. However, the First Circuit concluded that the findings of this court on the curtilage issue supported a conclusion that the exclusion of evidence was not necessary.

Applying a clear error review to the factual findings,[2] it rejected the Diehl/Cumming argument that Milligan's affidavit could be read as falsely indicating that he was on the town road, separated from the camp by dense forest, rather than the camp driveway when he smelled the marijuana odor. Id. at 42. "It is transparent," the panel concluded, "that Milligan's reference to standing 'on the dirt road' was a reference to the driveway entering the clearing." Id. With respect to my statement concerning the questionable accuracy of Milligan's description of his whereabouts, the panel stated:

> The magistrate judge found that Milligan's affidavit description was "not entirely accurate based upon the testimony presented at the hearing, as the officer was clearly in the private driveway of the residence." This measured finding is consistent with either inadvertence or sloppiness, but not with an intentional misrepresentation, or one made with reckless disregard of the truth. It is, if anything, an effort to conform the factual testimony to the preferred way of distinguishing the Old Bray Hill Road from the road leading off it to the camp. The inconsistency strikes us as more a matter of semantics than geography. We see no possibility that the issuing magistrate judge was misled by this statement in the affidavit.
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> It is true that Milligan's characterization of his position as being "away from the curtilage" states a legal conclusion, but this, contrary to appellants' assertion, did not "take[ ] away from the issuing court the ability to decide" the issue. The magistrate judge had information that Milligan was close enough to the camp to hear the hum of lights, to focus his thermal imager, and to hear voices from a poorly sound-proofed camp with, according to Cumming, "paper-thin walls."
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> Apart from their argument based on Milligan's use of the words "dirt road," appellants point to the inconsistent statements Milligan made as to precisely where he was standing when he smelled marijuana. These led the magistrate judge to credit appellants' view that he was eighty-two feet from the house. But the fact that Milligan identified various locations, testifying five months later about a 3 a.m. expedition in the snow while

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[2] As best as I can garner, Cumming was going to seek Supreme Court review, along with Diehl, of the First Circuit's ruling at least part on the ground that it did not apply the appropriate standard of review vis-à-vis the curtilage determination, an issue that his attorney felt had some viability. (See Pet'r Resp. Exs. A, B,C.) In concluding that it would review the factual findings on the curtilage issue for clear error and the legal conclusions de novo, the First Circuit opinion noted a split on whether a curtilage question is a factual matter subject to clear error review or a determination subject to de novo review. Diehl, 276 F.3d at 37-38 & n.2. However, Cumming decided to withdraw from this effort to seek certiorari review in the Supreme Court. (See Pet'r Resp. Exs. A, B,C.) Diehl's solo petition for cert was denied. Diehl v. United States, 123 S.Ct. 143 (2002).

> operating a thermal imaging device, has little bearing on the integrity of the warrant application.

Id. at 42-43. The Court noted that "the conduct of Milligan is faithfully set forth, with no suggestion that material information has been omitted." Id. at 43. "In sum," the Panel stated, "we think this is a case of 'a "penumbral zone," within which an inadvertent mistake would not call for exclusion,' thus protecting against the temptation for 'judges to bend fourth amendment standards' to avoid releasing suspects." Id. (quoting Leon, 468 U.S. at 925 n.26). In the Panel's view, Milligan's affidavit reflected "neither deliberate misstatement nor any other bad faith." Id. at 43-44 (emphasis added).

In light of this disposition the good faith question was, of course, the focus of the defense advocacy efforts in the Diehl/Cumming petition for rehearing and an en banc determination. (Sec. 2255 Mot. Ex. 9.) They argued that Milligan's exact physical location when he smelled the marijuana "was the most essential aspect" of his fourteen-page affidavit. (Id. at 2; see also id. at 2 n.1.) They argued that Milligan withheld "significant relevant information in his affidavit" (id. at 4) and fault Milligan with not including in the affidavit information on proximity, enclosure, use, and efforts used to ensure privacy (id. at 4-5 & n.3).

The attorneys asked for an en banc determination "in light of the fact that the parties below had only a combined 20 minutes to argue their appeals, and because of the other significant issues in the case, the subject of a good faith exception was barely touched upon in the oral argument." (Id. at 8.) They expressed the view "that a decision to apply the good faith exception should not be made at the first instance by an appellant court" but should be remanded to the trial court. (Id.) "It was obvious," Cumming and Diehl stressed, that the First Circuit panel had "placed weight on the testimony of

[Milligan] below, but the magistrate was obviously in a far better position to observe the agent's demeanor and credibility." (Id.)

The Affidavit of a Postal Employee

Paragraph 9 of the Milligan warrant affidavit reads:

> Deputy Cayer has also checked with the U.S. Post Office at Phillips and has learned that Post Office Box 409 is registered to IAN FABRICATIONS INCORPORATED, ANDREW DIEHL , MELISSA ANN SMITH/DIEHL, IAN SCOT FINKELL, and WILLIAM N. CUMMING. The Postmaster further indicated that this "company" has not received any business-related mail, suggesting that the "company" may be a front.

(Mot. Suppress & Frank's Hr'g Ex. 1 ¶ 9.)

Cumming argues that an affidavit by a postal clerk, Rebecca Hargreaves, refuted Paragraph 9 of the Milligan affidavit. In the affidavit Hargreaves, who is not the Postmaster, stated that she was uncomfortable when asked by an officer to keep track of the types of mail being delivered to the post office box registered to Ian Fabrications (Sec. 2255 Mot. Ex. 2 ¶¶ 4-5.) The affidavit states that Hargreaves never told the officer that Ian Fabrications did not receive business related mail. (Id. ¶ 9.) Cumming states that his attorney refused to utilize the Hargreaves affidavit in the suppression hearing because he insisted it was immaterial to probable cause due to the fact that the warrant affiant was not the agent who had visited the post-office.

However, Cumming's attorney did take steps to undermine the validity of Paragraph 9 of the affidavit with Hargreaves's affidavit. In the motion to suppress Cumming's attorney argued that Milligan's affidavit allegation with respect to the information garnered from the post-office was "inflammatory and unsupportable." (Mot. Suppress & Franks Hr'g at 6.) He envisioned that the Postmaster and Hargreaves could

testify on this score at the Franks hearing. (Id.) The Hargreaves affidavit was filed with the court on September 5, 2000, three days prior to the suppression hearing. (Docket No. 24.)[3] Although Cumming's attorney did not attempt to test Milligan's credibility at the hearing, in response to the written argument on this score, I indicated in my recommended decision that the statement attributed to the postmistress was "immaterial to the finding of probable cause." (Recommended Decision Mot. Suppress at 6 n.1.) I was plainly aware that Cumming's attorney wanted me to consider the Hargreaves affidavit as part of the Franks hearing. As Cumming concedes, his attorney did, on Cumming's insistence, refer to the affidavit in his unsuccessful motion for rehearing en banc. The brief argued that, while this portion of the affidavit might be immaterial to the probable cause analysis I undertook, it was material to the good faith analysis the First Circuit panel embarked upon. (Sec. 2255 Mot. Ex. 9 at 3 n.2.)

But, in Cumming's view, his attorney failed to understand the fact that just because it was a different officer, Cayer, that provided the information about the post-office's communications about the mail received did not mean that it was not relevant to the good faith inquiry. Cayer was also present at the search, Cumming complains, and helped execute the warrant and that fact should have significance for the good faith inquiry even if Milligan did not know that Cayer had been untruthful vis-à-vis the post-office box information. He also asserts that his attorney should have called Cayer to testify at the suppression hearing and used the Hargreaves affidavit to unveil the untruthfulness about his representations. This, Cumming argues, would go directly to the good faith concern, and beyond mere impeachment of Milligan's credibility. He claims

[3] When the affidavit was docketed by the clerk it was misattributed as supporting the motion for a view filed by Cumming.

that his attorney's erroneous understanding of the law, with respect to how to utilize the Hargreaves affidavit and to what end, deprived him of effective assistance with respect to Cumming's primary line of defense. However, as I read Cumming's § 2255 pleadings he envisioned his attorney presenting the evidence concerning the Hargreaves affidavit, the power records, and the credibility of other averments made in the affidavit, at a Franks hearing in short course after the hearing on the curtilage and before his plea and appeal.[4]

The Power Company Records

Cumming's challenge vis-à-vis the power company records implicates the contents of Paragraph 10 of the Milligan warrant affidavit. This paragraph states that Cayer consulted Milligan after Cayer's preliminary investigations. (Sec. § 2255 Mot. Ex. 7 ¶ 10.) It reads, further:

> [Because] this "company" is located in an obscure rural area of Maine and [because] a new "storage" building has been constructed at the property with access that would be difficult for commercial vehicles/trucks, I suspected that this property may be the site of an elaborate indoor marijuana cultivation operation. Based upon that suspicion, I contacted Special Agent Jay Stoothoff of the U.S. Drug Enforcement Administration for the issuance of an Administrative Subpoena for power consumption records for the property in question. A subpoena was issued to Central Maine Power Company and power records were forwarded to me on February 9, 2000. Upon reviewing these records, I have discovered that there are two separate accounts at this property; one providing power to the camp and one providing power to the storage building in question. The power consumption at the camp is remarkable. For the past eight months, the camp has used 16,627 kilowatt hours of power. This consumption equates to $2,500.00 worth of power for a wood-framed single storey camp. Additionally, the power consumption at the new storage building is also remarkable. For the past 3 months, this 20' x 72' structure with no water and no sewer used 12,731 kilowatt hours of power.

[4] Cumming seems to be operating under the misimpression that his attorney dropped the entire suppression motion when he abandoned his efforts to obtain a further Franks hearing. As I see it, the attorney went ahead with advocacy pertaining to the curtilage question and the good faith exception to exclusion. I had already indicated in the context of my scheduling order granting the limited hearing on the question of the curtilage that I did not believe that the Hargreaves affidavit was crucial to a finding of probable cause and that, pursuant to my Franks analysis, I would excise it from the warrant rather than hold a lengthy hearing on the issue.

> The average monthly power bill for the camp is in the $400 range while the average monthly power bill for the storage building has been between $345.00 and $801.00.

(Id.) Cumming takes exception with the passage concerning the discovery of two separate accounts at this property and the description of one of the buildings as the storage building in question. He claims that the power company can verify that neither of the two accounts was a "warehouse/storage building." In his reply brief Cumming clarifies: "The power lines to the storage building cannot be seen, because they are buried underground and [the power company] has no knowledge of their existence." (Pet'r Response Br. at 3.)[5]

Cumming argues that Milligan's description in the warrant was reckless, at best, and undermines his credibility. (Sec. 2255 Mot. at 14-16.) He asserts that his attorney should have investigated these power records/property descriptions prior to the suppression hearing to discredit Milligan's "story" about the camp and the storage building. The second power service, in actuality, Cumming contends, was to a garage that had not shown higher surface temperatures. (Id.) The storage/warehouse building had no (independent) power service. (Id.) This failure to investigate and put to the test this, and other inaccuracies in the affidavit, meant that there was not proper adversarial testing of the good faith basis for the affidavit, Cumming argues, and this translated into the ability of the United States to rely on these inaccuracies in support of its argument before the First Circuit. (Id. at 19-20)[6] If his attorney had performed competently,

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[5] In response to the United States' assertion that the videos showed lines running to the building in which the plants were found, Cumming claims they do not show this and states that there was absolutely no pre-search evidence that there were lines running to this structure and that post-search evidence does not vindicate pre-search wrongs. (Pet'rs Reply at 4-5.) Apparently he hid the power lines underground to avoid detection of the marijuana growing operation.

[6] In association with the power issue, Cumming contends that Paragraph 4 of the affidavit represents that there is no commercial development anywhere near the property. He states that there is a

Cumming contends, the First Circuit would not have reached the conclusion it did on the good faith question. (Id. at 21-22.) He also faults his attorney for not developing a greater challenge to good faith at the time of the September 8, 2000, suppression hearing (Id. at 22-23.)

I simply do not see, given the extra ordinary power use by two of three buildings on the premises, how the significance of Paragraph 10 would have changed in any measurable way vis-à-vis contributing to probable cause had Milligan stated that the second account was for the garage rather than the warehouse. So while Milligan may have been inaccurate in his understanding and description of these power lines and buildings, it would not have advanced the good faith case in any appreciable manner for Cumming's attorney to have pressed this issue at the suppression hearing. Furthermore, with respect to the apparent miscalculation of the monthly average for the camp at around $400, it was raised by Cumming's attorney in the motion to suppress, as $2500 divided by eight is $312.50. (Mot. Suppress & Hr'g at 6-7.) What is more, had the figure used been accurate the fact would not have been a scale tipper for the reviewing judge; the total usage over the eight-month period for the camp and the three month usage for the second building were accurately stated.

The Allegedly Perjurious Testimony of Agent Milligan and the Utility of Seeking Further Franks Hearing

Cumming's third ground focuses on Milligan's testimony that he did not take more than one or two steps toward the camp once he commenced the thermal imaging process. (Sec. 2255 Mot. at 25.) As Cumming points out, his argument at the

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large commercial operation approximately 1000 feet from the property, a fact that his attorney was apprised of but did not investigate. (Id. at 18.) I fail to see how this relates to the power records on accounts indisputably in the name of Diehl.

suppression hearing that Milligan actually walked almost forty feet while operating the device met with success with me. Milligan's lack of credibility on this key fact had relevance, in Cumming's view, to the credibility of his testimony on his smelling of the marijuana odor, other distance determinations, his characterizations of the curtilage, and his position in relation there to. (Id.) Cumming argues that his attorney should have pursued a Franks hearing on the basis of Milligan's untruthfulness on his whereabouts. (Id. at 25-26; see also Sec. 2255 Mot. at 4-6.)

Cumming's attorney did clarify to this court at the close of the suppression hearing that he considered the need for a Franks inquiry to be still pending. (Suppression Tr. at 239-40.) I invited counsel to make a proffer of the additional evidence (aside from Milligan's testimony and the Hargreaves affidavit, both of which I considered I already had before me) that would be presented at such a hearing. (Id. at 240, 242.) Defense counsel filed the joint memorandum on the curtilage issue but provided no factual proffer for further Franks proceeding. Nor has Cumming in the Section 2255 petition presented any proffer that would tip the good faith outcome. I concluded that while Milligan was inaccurate in a number of respects both in his testimony before me and in his affidavit allegations, he did not commit any constitutional violation when conducting the thermal imaging. In the absence of any perceived constitutional violation, I would have had no reason to conduct any further hearings on the issue of Milligan's good faith. Therefore his counsel's failure to press for any such hearing was hardly ineffective assistance of counsel.

As the discussion above shows, these challenges were brought to the attention of the First Circuit and they determined that the good faith exception should apply and that

there was not a knowing or reckless disregard on the part of Milligan vis-à-vis the warrant affidavit. In this context I cannot see how the ultimate outcome of a Franks inquiry for knowing or reckless misrepresentation would be different from the outcome of a Leon good faith analysis, and the First Circuit has had its say on the latter.

The "Preserved" Issues

Even if I considered Cumming's "preserved" issues as properly tendered for consideration, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), they have no lift for the following reasons.

First, Cumming claims that his attorney did not have an understanding of Kyllo v. United States, 533 U.S. 27 (2001) and did not raise the issue in this Court or on appeal. The majority in Kyllo held that,

> obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," Silverman [v. United States], 365 U.S. 505, [] 512 [(1961)] constitutes a search--at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search

Id. at 34-35. Cumming states that Milligan smelled odor while he was doing the thermal scan of Cumming's home and thus the marijuana odor evidence was obtained during an illegal, warrantless search and is the fruit of a poisonous tree. Neither defendant raised this issue during the suppression proceedings, even after I noted in my recommended decision that the thermal imaging/privacy issues of Kyllo were not an issue in the case. (Docket No. 29 at 6.)

There are several paragraphs in the affidavit that discuss thermal imaging. Paragraphs 11, 12, and 13 of the Milligan affidavit contained factual allegations relating to an early morning helicopter over-flight twenty-four hour prior to the search I have discussed, in which thermal imaging was used and disclosed high surface temperatures and heat escaping from the camp and the storage building. Paragraph 14, of course, deals with the search at the center of this motion which involved the use of a hand-held thermal imaging device. Paragraphs 15 and 16 then recount Milligan's training in using the thermography in law enforcement; his conclusion that heat detected was consistent with high intensity discharge lamps used for indoor marijuana cultivation; that it would be consistent with someone standing outdoors nearby, even outside the curtilage, to detect the odor of marijuana emanating from a structure containing an indoor marijuana grow because of the pungent and unique odor of the expelled waste air; and that the consecutive thermographic searches were done five hours after the sun went down to allow for solar heat to dissipate, ensuring a better thermographic image.

Assuming some claimed deficiency in counsel's failure to raise a Kyllo-esque challenge, Cumming cannot demonstrate that he was prejudiced by the deficiency. The First Circuit determined that even if Milligan's presence on the property was a violation of the defendants' fourth amendment rights, exclusion of the evidence was not warranted because the Leon good faith exception applied. They made this determination well after Kyllo was decided by the Supreme Court and with my reference to the issue before them. Cumming's argument that the fact that Milligan got to where he was when he smelled the odor only by use of the thermal imaging, the night before and the night of, adds nothing to Cumming's § 2255 ineffective assistance of counsel plea as the First Circuit already

was aware that Milligan was where he was at the time because he violated the defendants' fourth amendment rights to privacy.

And, it cannot be said that Milligan's use of and reliance on the thermal imaging adds anything to the argument that he acted in bad faith or with knowing or reckless disregard for the truth in investigating and preparing the affidavit. I reach this conclusion by recognizing that at the time of the investigation the use of thermal imaging was an untarnished state-of-the-art procedure and review by the Supreme Court would not be granted on the 9th Circuit's decision until months later. I do not see why Leon would not apply in the context of an officer's pre-Kyllo use of thermal imaging just as it does to an officer's mistaken conclusions concerning his positioning vis-à-vis the curtilage. See Kyllo, 533 U.S. at 40 (2001) (advising that on remand it remained the District Court's duty "to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause--and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced"); see also United States v. Holmes, 183 F.Supp.2d 108, 110 (D. Me. 2002) (citing the remand directive in Kyllo for the proposition that the Leon exception to exclusion might operate in this context).

Further supporting my conclusion vis-à-vis the lack of prejudice, I also note that the First Circuit was dubious that the curtilage/good faith exception was essential to the existence of probable cause underlying the warrant but proceeded on this assumption because this had, in a sense, become the law of the case. See Diehl, 276 F.3d at 41-42 ("We must reach this issue because of the concession that paragraph 14 of the warrant application, detailing Milligan's warrantless entry on the property and his detection of the

odor of marijuana, added a critically necessary basis for probable cause. In other words, it is not open to us to consider harmless error."). And, once again, the Panel held these doubts even though the Supreme Court's Kyllo had issued.

Cumming also faults counsel for not challenging the constitutionality of the weight equivalency for marijuana in 21 U.S.C. § 841 on the basis of Sentencing Amendment 516. Since that amendment became operative, this argument has been rejected by at least three appellate courts. See United States v. Marshall, 95 F.3d 700, 701 (8th Cir. 1996) ("We have previously held that section 841(b)(1)(B)(vii) and its concomitant mandatory minimum sentence provision are constitutional, see United States v. Coones, 982 F.2d 290, 292 (8th Cir.1992), and we conclude that Amendment 516 did not render it unconstitutional."); accord United States v. Smartt, 129 F.3d 539, 542 (10th Cir. 1997); United States v. Hester, 199 F.3d 1287, 1289-90 (11th Cir. 2000) affirmed on remand 287 F.3d 1355 (11th Cir. 2002). Furthermore, prior to the adoption of Sentencing Amendment 516, the First Circuit rejected such a challenge to a less defendant-friendly equivalency standard in United States Sentencing Guideline § 2D1.1(c). United States v. Taylor, 985 F.2d 3, 9 (1st Cir. 1993).

Third, Cumming seeks to preserve the issue of counsel's failure to utilize during the suppression hearing the video of Milligan's over flight of Cumming's home the night prior to the search. (Pet'rs Reply at 7; Sec. 2255 Mot. Ex. 1 ¶ 11.) Cumming claims it would have undermined Milligan's credibility because it would have given information on the commercial development of a neighbor "among other things." Cumming complains that his attorney never let him view this video despites request by Cumming. (Pet'rs Reply at 7.) This is pure speculation on Cumming's part and is without merit.

United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted); see also David v. United States, 134 F.3d 470, 478 (1st Cir. 1998) ("To progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings.").

The same fate awaits Cumming's "issue" concerning the United States' possession of bank records in the company's name that were addressed to the Ian Fabrications post-office box. Cumming is arguing that the prosecution was in possession of business mail that came to the post-office box, therefore it knew that Paragraph 9 of the warrant affidavit was false, and, therefore, it was not being truthful when it indicated to this court in its supplemental memorandum in response to the motion to suppress that there was "absolutely no evidence in the instant case that Agent Milligan misled the reviewing judge." (Pet's Reply at 8, quoting Suppl. Mem. Mot. Suppress at 12.) What Cumming has failed to grasp is that there is no indication that Milligan knew at the time he swore out and executed the affidavit anything about these records. It is his knowledge at that time, and not the content of the prosecution's discovery files months later, that is relevant to the warrant's validity.[7]

[7] I also note that this claim, which is the only claim or issue not postured as an ineffective assistance of counsel claim, is defaulted as it was not raised on direct review.

Finally, in his reply brief Cumming attempts to raise a claim that his attorney was ineffective in not arguing that when the warrant was executed the officers seized items outside the scope of the warrant. (Pet'rs Reply at 14.) The warrant allowed for the seizure of "papers and other affects relating to business record pertaining to the possession, furnishing, or the trafficking in scheduled drugs; evidence of dominion and control of evidence listed above if seized. (Sec. 2255 Mot. Ex. 1 at 15.) Cumming complains that they seized a birth certificate of Beverly Diane Pate, three letters (from Beverly, Ron, and Jeanette), and one book containing recipes. Even if this claim had been raised in the appropriate fashion, which it was not, the facts have no buoyancy.

Motion to Withdraw Guilty Plea

Cumming has included within his second supplemental motion a plea that he be allowed to withdraw his guilty plea because it was conditioned on his right to appeal. The obvious timeliness concern aside, I agree with the United States that the right that he preserved was only meaningful if he was successful on appeal. Cumming was not successful. While it is true that the First Circuit agreed with him on the curtilage question, its determination that the good faith exception to exclusion applies is now the law of this case. If Cumming were now granted a trial, the bottom line is that the evidence would not be suppressed.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** the motion to vacate and **DENY** the supplemental motion seeking to withdraw the guilty plea.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

June 23, 2003.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

CJACOUNSEL, CLOSED, 2255

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:00-cr-00028-GZS-2
Internal Use Only

Case title: USA v. DIEHL
Other court case number(s): None **Date Filed:** 05/17/00
Magistrate judge case number(s): 1:00-mj-00024

Assigned to: Judge GEORGE Z. SINGAL
Referred to:

Defendant(s)

WILLIAM N CUMMING (2) represented by **WILLIAM N CUMMING**

TERMINATED: 04/25/2001

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TERMINATED: 04/25/2001
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts	**Disposition**
None	

Highest Offense Level (Opening)

None

Terminated Counts	**Disposition**
21:841A=MM.F MARIJUANA - CONSPIRACY TO MANUFACTURE MARIJUANA IN EXCESS OF 100 PLANTS, AID & ABET (1)	Imprisonment of 37 months; Supervised Release of 4 years; $100 Special Assessment; Deft remanded to custody of US Marshal.
21:841A=MM.F MARIJUANA - MANUFACTURE IN EXCESS OF 100 PLAINTS, AID & ABET (2)	Dismissed on Government Motion
21:841A=MD.F MARIJUANA - POSSESSION W/INTENT TO DISTRIBUTE, AID & ABET	Dismissed on Government Motion

(3)

Highest Offense Level (Terminated)

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Felony

Complaints	**Disposition**
Ct. I - 21:841(a)(1) and (b)(1)(B) and 18:2 - manufacture marijuana and aid and abet commission of crime [1:00-m-24]	

Plaintiff

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